

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 20, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP2085

Cir. Ct. No. 2012CV3726

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

CATHERINE CONRAD,

PLAINTIFF-APPELLANT,

RODNEY RIGSBY,

PLAINTIFF,

v.

**MICHAEL CROOKS, ELIZABETH RUSSELL, ESQ, PETERSON, JOHNSON
& MURRAY, WISCONSIN LAWYERS MUTUAL INSURANCE COMPANY AND
BRIAN ANDERSON,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Dane County:
SHELLEY J. GAYLORD, Judge. *Affirmed.*

Before Blanchard, P.J., Lundsten and Sherman, JJ.

¶1 PER CURIAM. Catherine Conrad appeals the circuit court’s judgment finding Conrad’s action frivolous and imposing sanctions. Conrad asserts that her claims have merit.¹ For the reasons explained below, we affirm.

Background

¶2 This action stems from Conrad’s dissatisfaction with the legal services Conrad obtained from Attorney Elizabeth Russell.² Conrad sued Russell for legal malpractice and breach of contract, and then initiated this action against Russell’s malpractice insurance carriers and defense attorneys for failing to settle Conrad’s claim.³ Conrad argued that Wisconsin Lawyers Mutual Insurance Company acted in bad faith and breached its duties under its contract with Russell;

¹ While Conrad asserts many wrongful acts on the part of the respondents, the only coherent arguments we decipher in her brief relate to the merits of the claims in her complaint. Accordingly, we limit our discussion in this opinion to those issues. See *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we need not address inadequately briefed issues). Additionally, we note that Conrad’s notice of appeal was timely only as to the judgment for sanctions, not as to the order dismissing Conrad’s complaint. See WIS. STAT. § 808.04(1) (2011-12). Thus, the only issues within the scope of this appeal relate to the circuit court’s determination of frivolousness and the imposition of sanctions. See WIS. STAT. RULE 809.10(1)(e). We therefore treat Conrad’s arguments as to the merits of her claims as an argument that she did not pursue a frivolous action, and address them as such.

All further references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

² The circuit court imposed sanctions in this case based on the court’s finding that Conrad had fair warning that the claims asserted in Conrad’s complaint were clearly lacking any basis in law. Because Conrad’s challenge to the court’s award of sanctions is premised on the argument that her complaint sets forth valid claims, for purposes of this opinion we rely on the facts set forth in Conrad’s complaint. See, e.g., *Putnam v. Time Warner Cable of Se. Wis.*, 2002 WI 108, ¶11, 255 Wis. 2d 447, 649 N.W.2d 626 (when we review an order dismissing a complaint for failure to state a claim, we assume the truth of the facts asserted in the complaint).

³ Rodney Rigsby was also a plaintiff below, but has not appealed the circuit court’s decision.

that Russell's counsel committed malpractice; and that Russell's counsel acted dishonestly and in violation of supreme court rules.

¶3 Counsel for the defendants sent Conrad statutory Safe Harbor letters explaining its view that Conrad's action was frivolous, and that the defendants would move to dismiss and for sanctions if Conrad did not withdraw her complaint within twenty-one days. *See* WIS. STAT. § 895.044(1)(b). Conrad declined to withdraw her complaint. The circuit court dismissed Conrad's complaint for failing to state a claim and imposed sanctions. Conrad appeals the judgment imposing sanctions for a frivolous action.

Discussion

¶4 In this appeal of the circuit court's judgment for sanctions for a frivolous action, Conrad asserts only that her complaint set forth valid claims. Specifically, Conrad argues that she has stated the following valid claims: (1) bad faith and breach of fiduciary duty claims against Russell's malpractice insurance carrier for failing to settle Conrad's claim against Russell; (2) a malpractice claim against Russell's counsel for failing to advise Russell to settle; and (3) claims against Russell's counsel for fraud and violation of supreme court rules in the course of defending Russell. We conclude that all of the claims set forth in Conrad's complaint plainly lack a basis in law or fact.

¶5 Conrad argues that she has set forth valid claims against Russell's malpractice insurance carrier. Conrad argues that the insurance company acted in bad faith and breached its fiduciary duty by failing to settle Conrad's claim within Russell's policy limits. These arguments are wholly lacking in merit.

¶6 Under well-settled Wisconsin law, a third party who has asserted a claim against an insured cannot bring a bad faith claim against the insured's insurance company. Our supreme court has plainly stated: "The insurer's duty of good faith and fair dealing arises from the insurance contract and runs to the insured. No such duty can be implied in favor of the claimant from the contract since the claimant is a stranger to the contract and to the fiduciary relationship it signifies." *Kranzush v. Badger State Mut. Cas. Co.*, 103 Wis. 2d 56, 73, 307 N.W.2d 256 (1981). Thus, the court explained: "In the absence of any such duty, the third-party claimant cannot assert a claim for failing to settle h[er] claim" *Id.* at 74. Accordingly, Conrad's claims premised on Russell's malpractice insurance company's failing to settle Conrad's claim fail as a matter of law.

¶7 Conrad also argues that she has stated a claim against Russell's counsel for malpractice in defending Russell against Conrad's claims. Conrad argues that Russell's counsel should have advised Russell to settle. However, a claim of malpractice requires a showing of an attorney-client relationship.⁴ *See Lewandowski v. Continental Cas. Co.*, 88 Wis. 2d 271, 277, 276 N.W.2d 284 (1979). Conrad has not alleged an attorney-client relationship with Russell's counsel. Accordingly, this claim fails as a matter of law.

¶8 Conrad also asserts that she has stated a claim for fraud against Russell's counsel. So far as we can tell, Conrad is arguing that Russell's counsel committed fraud by failing to provide Conrad with discovery and by defending

⁴ The respondents cite *Landwehr v. Conway*, No. 1983AP1470, unpublished slip op. (Ct. App. Apr. 25, 1984), in support of this proposition. We remind counsel for the respondents that unpublished per curiam opinions are of no precedential value and may not be cited except in limited circumstances that are not present here. *See* WIS. STAT. RULE 809.23(3).

Russell when counsel knew Russell had committed malpractice. Again, this argument is entirely lacking in merit.

¶9 A claim of fraud requires the following elements:

(1) the defendant made a factual representation, (2) which was untrue, (3) the defendant either made the representation knowing it was untrue or made it recklessly without caring whether it was true or false, (4) the defendant made the representation with intent to defraud and to induce another to act upon it, and (5) the plaintiff believed the statement to be true and relied on it to his/her detriment.

Williamson v. Hi-Liter Graphics, LLC, 2012 WI App 37, ¶13 n.6, 340 Wis. 2d 485, 811 N.W.2d 866. Additionally, “[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.” *See* WIS. STAT. § 802.03(2). Thus, a plaintiff must plead “the ‘who, what, when, where and how’” of a fraud claim. *Friends of Kenwood v. Green*, 2000 WI App 217, ¶14, 239 Wis. 2d 78, 619 N.W.2d 271 (quoted source omitted).

¶10 Here, Conrad’s complaint does not set forth any facts that would support a claim that Russell’s counsel made a false representation to Conrad that induced Conrad to act to her detriment. Rather, Conrad’s complaint sets forth vague assertions that Russell’s counsel was dishonest in connection with defending Russell against Conrad’s claims.⁵ Accordingly, Conrad has not stated a claim for fraud.

⁵ Conrad’s complaint is lengthy and largely incoherent. We do not attempt to set forth all of the complaint’s factual allegations in this opinion. As to Conrad’s claim of fraud, Conrad sets forth conclusory allegations such as the following: Russell’s counsel “commit[ed] fraud on [Conrad] and on the courts in their dishonesty calculated for their own advantage during the litigation” of Conrad’s case against Russell; “At all times all [d]efendants[] had the information that would give [Conrad] the win and purposely withheld it”; and “All [d]efendants answered

(continued)

¶11 Finally, Conrad asserts that she has stated a claim against Russell’s counsel by asserting counsel violated supreme court rules. As to this argument, it is sufficient for us to note that the preamble to the rules specifically states that the rules are not a basis to impose liability. *See* SCR ch. 20, Preamble: A Lawyer’s Responsibilities.

¶12 We conclude that Conrad’s claims lacked any reasonable basis in law. Further, it is apparent from the inadequacy of the complaint that Conrad either knew or should have known that her claims had no basis in existing law or a good faith argument for the extension of existing law. *See* WIS. STAT. § 895.044(1)(b). Conrad’s complaint is so woefully inadequate that any reasonable person, even untrained in law, should have recognized that it had no basis in law. Accordingly, sanctions were mandatory after Conrad was served Safe Harbor letters and failed to withdraw her complaint. *See* § 895.044(2)(b).

¶13 Additionally, we conclude that the circuit court properly exercised its discretion in determining that sanctions were also appropriate under WIS. STAT. § 802.05. *See Keller v. Patterson*, 2012 WI App 78, ¶¶20-23, 343 Wis. 2d 569, 819 N.W.2d 841, *review denied*, 2013 WI 6, 345 Wis. 2d 405, 827 N.W.2d 95. The court explained that Conrad was given fair warning through the Safe Harbor letters and her defeat in similar lawsuits that the claims she pursued here simply do not exist. As the circuit court explained: “There are no more clear ways to tell you that [you] should have ceased and desisted long ago. And the sanctions statute was designed precisely for this kind of a case, to not continually bring

discovery with false statements, knew their answers were untrue and intended to deceive [Conrad by] not disclosing crucial facts, withholding information and files which were the property of Conrad.” These vague and conclusory allegations are insufficient to support a claim of fraud.

actions that have been rejected previously” Because even a cursory inquiry into the facts and law would have revealed that Conrad’s claims are baseless, sanctions were appropriate under § 802.05(3).

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

